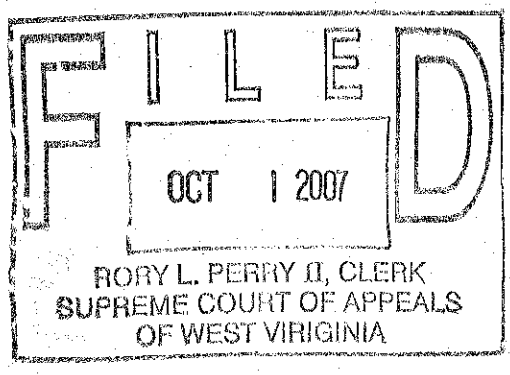
NO. 33453

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Appellee,

v.

HAROLD LEE CYRUS,

Appellant.

BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

DEBORAH K. GARTON
ASSISTANT PROSECUTING ATTORNEY
West Virginia State Bar No. 4752
Mercer County Annex
120 Scott Street - Suite 200
Princeton, West Virginia 24740
(304) 487-8355

DAWN E. WARFIELD
DEPUTY ATTORNEY GENERAL
West Virginia State Bar No. 3927
State Capitol, Room E-26
Charleston, West Virginia 25305
(304) 558-2021

Counsel for Appellee

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NOW COMES the State of West Virginia, by its Assistant Prosecuting Attorney Deborah K. Garton, and responds to the Appellant's Brief as follows:

I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

The State does not dispute the recital of fact (with the exception that some counts are misnumbered) in that portion of Appellant's Brief regarding this criminal case and its outcome. However, to clarify matters somewhat, the Appellant was charged in a 23-count Indictment alleging various sexual offenses involving two children, V.C., his daughter, and K.S., his stepdaughter, from 1996 to 2003.[1] At the conclusion of the evidence, the State moved to dismiss Counts 1, 2, 6, 7, 8, 9, 10 and 11 because K.S. denied having been assaulted during a brief period in Mercer County in

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[1]V.C.'s abuse in Mercer County was in 1996. K.S.'s abuse in Mercer County was from 1996 to 2003, excluding 1997.

1996. (Trial Tr., 390, 391.) The Petitioner was found not guilty of Count 3 (V.C.-1st Degree Sexual Assault), Count 4 (V.C.-Sexual Abuse by a Custodian), Count 5 (V.C.-Incest), Count 12 (K.S.-1st Degree Sexual Assault), Count 13 (K.S.-Sexual Abuse by a Custodian), Count 14 (K.S.-Incest), Count 15 (K.S.-1st Degree Sexual Assault), Count 16 (K.S.-Sexual Abuse by a Custodian), Count 17 (K.S.-Incest), Count 18 (K.S.-3rd Degree Sexual Assault), and Count 21 (K.S.-3rd Degree Sexual Assault). He was found guilty on Counts 19 (K.S.-Sexual Abuse by a Custodian), 20 (K.S.-Incest), 22 (K.S.-Sexual Abuse by a Custodian), and 23 (K.S.-Incest). It appeared that the jury based its verdict on the medical evidence of Dr. Gregory Wallace and Shirley Aycoth regarding the condition of KS's hymen before and after the assaults in 2002 and 2003. (*See* Trial Tr., 383.)

By Order entered July 24, 2006, the Mercer County Circuit Court sentenced the Appellant to consecutive terms of 10-20 years on each count of Sexual Abuse by a Custodian, and 5-15 years on each count of Incest. The court suspended imposition of sentence on the second count of Sexual Abuse by a Custodian, and ordered the Appellant placed on probation for 10 years following his discharge from confinement on the three remaining sentences. It is from this order that the Appellant now appeals.

II.

STATEMENT OF FACTS

The State disputes many of the "factual" statements recited by Appellant. However, before addressing specific allegations, it might be helpful to consider an overview of the evidence adduced at trial.[2]

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[2]Although there were a number of children involved in this case (siblings, step-siblings, half-siblings) and at any given time some or all of these children were living with the Appellant and the victims, the State will omit any reference to these children's presence as it is immaterial.

The Indictment alleged that both V.C. and K.S. were sexually abused by the Appellant in Mercer County. However, the abuse had begun in McDowell County where K.S. was living with the Appellant and his wife, her mother. During that time, V.C.'s mother (Appellant's first wife) became ill and V.C. went to live in Appellant's home. V.C. testified that the sexual abuse was frequent and there was severe corporal punishment for disclosing. (Trial Tr., 166, 168.) K.S. had one vivid memory of sexual abuse and punishment for disclosure in the McDowell County residence. (*Id.* at 215-18.)

The family then moved to Mercer County for a short time. V.C. remembered three or four instances of sexual abuse (*id.* at 171) and K.S. remembered none (*id.* at 222). The family returned to McDowell County where the sexual abuse continued. V.C. disclosed and was removed from the home. (*Id.* at 175.) When K.S. was asked about the Appellant's conduct, she lied and denied any abuse. (*Id.* at 226.) The Appellant and his family, minus V.C., then moved back to Mercer County. Until K.S. disclosed and was removed from the home, she was involved in some type of sexual activity with the Appellant basically every day. (*Id.* at 231.)

At trial, V.C. and K.S. primarily described the sexual abuse by identifying pictures of the houses in which they lived, both in McDowell County and in Mercer County. It was clearly easier for them to describe the abuse in relationship to the house in which it occurred, as opposed to a particular age or date.

Appellant's Statement of Fact blends both allegations and arguments. Many of the quotes are taken out of context. Rather than identifying and arguing in opposition to some of the Appellant's allegations of fact, the State will address each item in the Argument portion of this Brief.

III.

ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN NOT REQUIRING THE STATE TO COMPLY WITH RULE 16 OF THE WEST VIRGINIA RULES OF CRIMINAL PROCEDURE BECAUSE SHANNON BECK, CRYSTAL LEEDY, AND SHIRLEY AYCOTH WERE FACT WITNESSES, AND WERE NOT OFFERED AS EXPERTS BY THE STATE.

> "'The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.' Syllabus Point 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955), overruled on other grounds, *State ex rel. R.L. v. Bedell*, 192 W.Va. 435, 452 S.E.2d 893 (1994)." Syllabus Point 1, *State v. Calloway*, 207 W.Va. 43, 528 S.E.2d 490 (1999).

Syl. Pt. 4, *State v. Gray*, 217 W.Va. 591, 619 S.E.2d 104 (2005) (*per curiam*).

Appellant asserts that the trial court erred in not requiring the State to comply with Rule 16 of the West Virginia Rules of Criminal Procedure with respect to the testimony of Shannon Beck, Crystal Leedy, and Shirley Aycoth.[3] This assignment of error is erroneous for several reasons. First, Appellant pretends that these witnesses were called as experts by the State to provide expert opinions despite having provided no written summary of their testimony pursuant to Rule 16. That is not true. They were called as factual witnesses and, in direct examination, they were asked about specific matters with which they were familiar; they were not asked for their expert opinions. Second,

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[3]Rule 16(a) of the West Virginia Rules of Criminal Procedure provides in pertinent part:

> (E) Expert Witnesses. Upon request of the defendant, the state shall disclose to the defendant a written summary of testimony the state intends to use under Rule 702, 703, or 705 of the Rules of Evidence during its case in chief at trial. The summary must describe the witnesses' opinions, the bases and reasons therefor, and the witnesses' qualifications.

Appellant actually turned the State's witnesses into experts by virtue of *his* questions. This is vividly illustrated if one examines the entire record, as opposed to the misleading excerpts of testimony contained in Appellant's Brief.

Shannon Beck was K.S.'s counselor. (Trial Tr., 296-326.) The Appellant had not been provided with a summary of Ms. Beck's testimony in advance of trial because he was given a complete copy of her treatment records, and the State asked her nothing that deviated from those records.[4] During direct examination, Ms. Beck testified as to her treatment of K.S. and their goals. (Trial Tr., 296-310.) She was never asked about the dynamics of the Child Sexual Abuse Syndrome, the disclosure process, recantation, etc. It is conceded that had the State intended to use Ms. Beck for such a purpose, her testimony would have deviated from her treatment records, and the State would have been required to provide the defense with a summary.

During her direct testimony, "recantation" was referred to twice. The first incident occurred when Ms. Beck testified that K.S.'s mother questioned whether K.S.'s allegations were true; Ms. Beck stated that she explained recantation to the mother. (Trial Tr., 302.) Ms. Beck was also specifically asked if K.S. had ever recanted to her. (*Id.* at 309.) In contrast, the defense's cross-examination of Ms. Beck dealt almost exclusively with recantation, basically turned Ms. Beck into an expert, and raised the topic beyond the factual situation of the case. (*Id.* at 312-26.)

Krystal Leedy is a Child Protective Service (CPS) worker with the Department of Health and Human Resources (DHHR). (Trial Tr., 326-48.) Ms. Leedy's direct testimony was only in reference to her participation as K.S.'s case manager. (*Id.* at 329.) She was not asked about any symptoms she observed regarding the Child Abuse Syndrome, the concepts of recantation and disclosure, etc. She

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[4]The State's open file policy was acknowledged by the court prior to trial. (Trial Tr., 11.)

did discuss one episode of recantation when K.S. was under oath during an abuse and neglect proceeding. (Trial Tr., 332-34.) Of course, the defense was well aware of all these aspects of Ms. Leedy's testimony because they had been provided with all the DHHR records, as well as the transcript from the civil proceeding; indeed, this particular recantation had been mentioned in opening statements by both sides. (Trial Tr., 136 and 143.)

As in the case of Ms. Beck, it was the defense who made Ms. Leedy their expert. Up until cross-examination, Ms. Leedy testified only about her direct involvement in the case. During cross-examination, she was not only asked about Dr. Gregory Wallace's medical examination (in which she had no participation), the CPS worker was questioned about his medical findings! (Trial Tr., 345-46.) It was at this juncture in her testimony that she offered an expert opinion that there are actually very few sexual abuse cases in which physical evidence is found. (*Id.* at 346.)

Shirley Aycoth is a nurse practitioner. (*Id.* at 377-84.) She had conducted a sexual assault examination of K.S. in 2003; the Appellant, of course, had a copy of her report. During direct examination, she testified solely on the basis of her medical findings and what was told to her by K.S. She was asked no expert questions. During cross-examination, she was asked to repeat the results of her examination, and she stated that there were no physical findings. (*Id.* at 381.) The defense then asked her for an expert opinion; i.e., Is it common to have physical findings in child sexual assault cases? (*Id.*) Ms. Aycoth was also used by the Appellant as an expert when she was questioned concerning the results of Dr. Wallace's report, which predated her own examination by one year. (*Id.* at 383.)

In his Brief, Appellant contends that the State violated Rule 16 which "hampered the defense at trial in that they did not know what to expect from these witnesses and clearly the nondisclosure

did hamper preparation and presentation" of his case. (Appellant 's Brief at 12.) However, in the Argument portion of his Brief, Appellant cites *no* specific incidence where Ms. Beck, Ms. Leedy, or Ms. Aycoth offered expert opinions. There is a reference found in his Statement of Facts concerning Ms. Leedy, but it appears that this was cited in connection with the lack of an *in camera* hearing as to their second assignment of error. It is unknown, from any portion of Appellant's Brief, how Appellant claims that Ms. Aycoth was used as an expert witness. The most obvious expert testimony offered during the entire trial was the exchange between defense counsel and Ms. Beck with respect to the theory of recantation. (Appellant's Brief at 11.) Surely, the disingenuousness of this argument is patently clear--it was defense counsel who opened the door; it was the defense counsel's direct question during cross-examination that produced an expert response.

This Court has long held that a party cannot complain on appeal about the introduction of evidence adduced by him. *See* Syl. Pt. 2, *State v. Bowman*, 155 W.Va. 562, 184 S.E.2d 314 (1971) ("An appellant or plaintiff in error will not be permitted to complain of error in the admission of evidence which he offered or elicited, and this is true even of a defendant in a criminal case."); Syl. Pt. 4, *State v. Johnson*, 197 W.Va. 575, 476 S.E.2d 522 (1996) ("'A judgment will not be reversed for any error in the record introduced by or invited by the party seeking reversal.' Syl. pt. 21, *State v. Riley*, 151 W.Va. 364, 151 S.E.2d 308 (1966)."); *State v. Bennett*, 183 W.Va. 570, 396 S.E.2d 751 (1990). There was no error in the trial court's rulings in this regard.

B. THE TRIAL COURT DID NOT ERR IN FAILING TO HAVE A PRETRIAL HEARING PURSUANT TO RULE 404 OF THE WEST VIRGINIA RULES OF EVIDENCE, BECAUSE THE EVIDENCE AT ISSUE WAS PROPERLY ADMITTED BY THE COURT AS PART OF THE RES GESTAE.

Appellant asserts that the trial court erred in failing to have a pretrial hearing as to the admissibility of "other bad act" evidence pursuant to Rule 404 of the West Virginia Rules of

Evidence. The trial court did not have a pretrial hearing as to the admissibility of other bad acts during Appellant's trial because the State did not present evidence of other bad acts.

> "'Other criminal act evidence admissible as part of the res gestae or same transaction introduced for the purpose of explaining the crime charged must be confined to that which is reasonably necessary to accomplish such purpose.' Syllabus Point 1, *State v. Spicer*, 162 W.Va. 127, 245 S.E.2d 922 (1978)."

Syl. Pt. 5, *State ex rel. Wensell v. Trent*, 218 W. Va. 529, 625 S.E.2d 291 (2005) (per curiam).

This matter was adjudicated by the court prior to trial. Given the fact that the trial court was unaware of the factual situation in his case, the State alerted the judge that there would be testimony concerning incidents which occurred in McDowell County. (Trial Tr., 13.) Indeed, the abuse started in McDowell County. The severe physical punishment for disclosure primarily occurred in McDowell County. During the time period covered by the Indictment, Appellant lived in McDowell County, moved to Mercer County, relocated back to McDowell County and then returned to Mercer County. The abuse was fluid and impossible to segregate. After much discussion concerning both the physical and sexual abuse suffered by V.C. and K.S. (*id.* at 15-17), the court ruled that the sexual abuse was a continuing act and testimony concerning the McDowell County incidents was admissible (*id.* at 16-17). After additional discussion regarding the admissibility of the physical abuse (*id.* at 17-18), the court ruled that physical violence as punishment in connection with the sexual assaults was admissible and part of the res gestae; separate, unrelated physical abuse would be inadmissible (*id.* at 19). The State adhered to the court's ruling.

In *State v. LaRock*, 196 W. Va. 294, 313, 470 S.E.2d 613, 632 (1996), this Court held that "historical evidence of uncharged prior acts which is inextricably intertwined with the charged crime is admissible over a Rule 403 objection." The Court explained that:

> In determining whether the admissibility of evidence of "other bad acts" is governed by Rule 404(b), we first must determine if the evidence is "intrinsic" or "extrinsic." *See United States v. Williams*, 900 F.2d 823, 825 (5th Cir.1990): "'Other act' evidence is 'intrinsic' when the evidence of the other act and the evidence of the crime charged are 'inextricably intertwined' or both acts are part of a 'single criminal episode' or the other acts were 'necessary preliminaries' to the crime charged." (Citations omitted). If the proffer fits into the "intrinsic" category, evidence of other crimes should not be suppressed when those facts come in as res geste--as part and parcel of the proof charged in the indictment. *See United States v. Masters*, 622 F.2d 83, 86 (4th Cir.1980) (stating evidence is admissible when it provides the context of the crime, "is necessary to a 'full presentation' of the case, or is . . . appropriate in order 'to complete the story of the crime on trial by proving its immediate context or the "res geste"'"). (Citations omitted).

LaRock, 196 W. Va. at 312 n.29, 470 S.E.2d at 631 n.29.

In the *Wensell* case cited previously, the defendant was charged with sexually abusing his stepdaughters. This Court found that evidence of physical punishment inflicted by the defendant on his stepdaughters

> was merely presented as context evidence illustrating why the appellant's stepdaughters were terrified of him and were fearful to report the appellant's conduct while the appellant was living under the same roof. It portrayed to the jurors the complete story of the inextricably linked events with regard to the interaction between the appellant and his stepdaughters and amounted to intrinsic evidence. Moreover, even though the State had no obligation to provide notice of Rule 404(b) evidence, it did so anyway in its initial discovery materials. The State advised of its intent to seek admission of the evidence because the excessive and harsh disciplinary measures by the appellant against his stepchildren provided the complete picture for the sexual abuse and explained the delay in reporting by the children until the time they were outside of the appellant's care, custody, and control. The State also advised of its intention to use evidence of a domestic violence episode in the home by the appellant against his wife, which was committed in the presence of the children. Clearly, the purpose of the evidence was to further demonstrate the conditions in the home which would cause the children to be fearful of making disclosures to anyone while the family resided together. The showing that the incident had actually occurred was made by the appellant's guilty plea to a domestic battery charge in connection with that event.

Wensell, 218 W. Va. at 536, 625 S.E.2d at 298.

In the present case, the evidence of sexual abuse which began in McDowell County and continued after the family moved to Mercer County, as well as the physical punishment inflicted on V.C. after she disclosed the abuse, was inextricably entwined with the evidence of the charged crimes, and also helped to explain why K.S. had recanted her disclosure of Appellant's sexual abuse during earlier abuse and neglect proceedings. The Appellant was already well aware of these events, and in fact relied on KS's recantation in his defense. The State disclosed its intention to use this evidence prior to the start of the trial, and the trial court did not abuse its discretion in ruling that it would be admissible as intrinsic evidence.

During the course of the trial, Rule 404(b) once again came into play. As noted *supra*, V.C. disclosed her abuse in McDowell County and was removed. (*Id.* at 175.) At that time, KS denied abuse and was able to stay with her family. However, when she disclosed in 2003, she was also removed from the home. (*Id.* at. 245.) During the testimony of V.C. and KS, there was never a defense objection to mention of their removal from the Appellant's home.[5] While KS was in foster care and contrary to a court order, Appellant continued to have communication with KS through her mother, his wife. (*Id.* at 247-55.)

The "termination issue" – removal from the home, visitation by the mother, contraband communication between the Appellant and KS, recantation letters, etc.– could not be ignored in this trial. Recantation was central to the Appellant's defense. The State could not have countered that defense except by explaining that KS was living in a foster home, Appellant was communicating with her to coerce a recantation, and the recantation letters had been manufactured. (*Id.* at 341-43.)

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[5]The defense would have no objection to such testimony because termination was a part of the Appellant's theory of his case as was explained in opening statement. (Trial Tr., 142.)

When the State was examining Ms. Leeds and preparing to ask her about KS's recantation under oath at an abuse and neglect hearing, the trial judge called counsel to the bench and evinced his concern that if it was learned that Appellant's parental rights had been terminated, it might suggest that a judge had already adjudicated his guilt. (*Id.* at 330 and 331.) The judge explained that he understood why KS's recantation at the civil proceeding was being presented to the jury by both parties, but he did not want counsel to get into termination of parental rights. The State explained that her next series of questions would be to ask Ms. Leeds if she was present at the hearing when KS recanted. (*Id.* at 331.) Unfortunately, when counsel asked Ms. Leeds the question, she inadvertently referred to a "termination proceeding." (*Id.* at 332.) Not only did the defense not object to counsel's mistake, Ms. Leeds actually corrected her and stated that KS had recanted in an "adjudication" proceeding, not a "termination" proceeding. (*Id.*) Following that one misstep, the State did not again discuss a "termination" proceeding, and the jury was never notified whether anyone's parental rights had ever been terminated.[6] Also, the jury was given a cautionary instruction that Ms. Leeds's testimony only related to K.S.'s credibility and not the Appellant's guilt or innocence. (*Id.* at 334-35.)

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[6]The Appellant alleges that the State asked Ms. Beck a question about termination of parental rights in violation of the trial court's ruling in this regard. (*See* Appellant's Brief at 5.) This is also not true. The record reflects that the question, which included the phrase "parental rights had not been terminated," was asked *before* the trial court made its ruling, and was not objected to by the defense. (*See* Trial Tr., 299.) While defense counsel objected to a subsequent question, it was based upon "prior matters placed before the Court" – ostensibly the State's failure to disclose her as an expert – and was properly overruled. (*Id.*) The jury was also instructed that Ms. Beck's testimony was to be considered by them only on the issue of KS's credibility, and not the Appellant's guilt or innocence. (*Id.* at 301.)

IV.

CONCLUSION

Mercer County has an open file policy with respect to criminal defendants, as evidenced by the trial judge's inquiry to make sure that the defense had all of the State's documents. (Trial Tr., 11.) The Appellant attempts to make an issue of the fact that the State's discovery documents are not part of the record on appeal. The State will be happy to provide this Court with an attested copy of the voluminous discovery materials provided to Appellant's counsel in this matter, if the Court so requests. Significantly, the Appellant does not allege that the State failed to provide him with all relevant documents in this case.

The only thing the defense was interested in prior to trial was whether the State intended to introduce expert testimony with respect to recantation. The court was advised on several occasions that the State did not intend to call such experts. None of the State's witnesses proffered expert testimony during direct examination. However, for some unknown reason, the defense questioned the State's witnesses regarding technical matters, within and without their areas of expertise. The witnesses responded to these questions, and now the Appellant contends that this was somehow an error on the part of the State. If there was any error, it was invited by the Appellant.

The Appellant charges the State with acting in bad faith and failing to provide disclosure of evidence. That is patently untrue. The defense had complete and total disclosure of all the State's evidence, both inculpatory and exculpatory. The State concedes it did not file a motion of its intent to use Rule 404(b) evidence because, as it explained to the trial court, it did not consider the McDowell County assaults as "other bad acts"; they were part of the same continuous act. After hearing a summary of the State's evidence, the court agreed.

WHEREFORE, for the foregoing reasons the judgment of the Circuit Court of Mercer County should be affirmed by this Honorable Court.

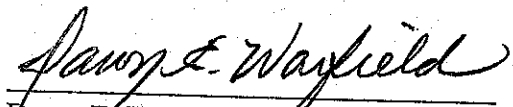
Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

By Counsel

Deborah K. Garton (WVSB #4752)
Assistant Prosecuting Attorney
Mercer County Annex
120 Scott Street - Suite 200
Princeton, WV 24740
(304) 487-8355

Assisted by:



Dawn E. Warfield (WVSB #3927)
Deputy Attorney General
State Capitol, Room E-26
Charleston, West Virginia 25305
(304) 558-2021

CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee, State of West Virginia* was served upon counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 1st day of October, 2007, addressed to him as follows:

Phillip Scantlebury, Esq.
Smith & Scantlebury, L.C.
Suite 205, Law & Commerce Building
Bluefield, West Virginia 24701

Dawn E. Warfield

DAWN E. WARFIELD
DEPUTY ATTORNEY GENERAL